

# **EPA NEW ENGLAND'S REVIEW OF MASSACHUSETTS' 2012 CWA SECTION 303(d) LIST**

## **I. INTRODUCTION**

EPA has conducted a complete review of Massachusetts' (MA) 2012 Section 303(d) list and supporting documentation and information and, based on this review, EPA has determined that Massachusetts' list of water quality limited segments (WQLSs) still requiring total maximum daily loads (TMDLs) meets the requirements of Section 303(d) of the Clean Water Act ("CWA" or "the Act") and EPA implementing regulations. Therefore, by this order, EPA hereby approves Massachusetts' 2012 final Section 303(d) list, included as part of the *2012 State of Massachusetts Integrated List of Waters Final Listing of the Condition of Massachusetts' Waters Pursuant to Sections 305(b) and 303(d) of the Federal Clean Water Act (IL)* dated March 27, 2013. The Final IL was received by EPA on April 2, 2013. The statutory and regulatory requirements, and EPA's review of Massachusetts' compliance with each requirement, are described in detail below.

## **II. STATUTORY AND REGULATORY BACKGROUND**

### **Identification of WQLSs for Inclusion on 303(d) List**

Section 303(d)(1) of the Act directs States to identify those waters within its jurisdiction for which effluent limitations required by Section 301(b)(1)(A) and (B) are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters. The Section 303(d) listing requirement applies to waters impaired by point and/or nonpoint sources, pursuant to EPA's long-standing interpretation of Section 303(d).

EPA regulations provide that States do not need to list waters where the following controls are adequate to implement applicable standards: (1) technology-based effluent limitations required by the Act, (2) more stringent effluent limitations required by State or local authority, and (3) other pollution control requirements required by State, local, or federal authority. See 40 CFR Section 130.7(b)(1).

### **Consideration of Existing and Readily Available Water Quality-Related Data and Information**

In developing Section 303(d) lists, States are required to assemble and evaluate all existing and readily available water quality related data and information, including, at a minimum, consideration of existing and readily available data and information about the following categories of waters: (1) waters identified as partially meeting or not meeting designated uses, or as threatened, in the State's most recent Section 305(b) report; (2) waters for which dilution calculations or predictive modeling indicate nonattainment of applicable standards; (3) waters for which water quality problems have been reported by governmental agencies, members of the public, or academic institutions; and (4) waters identified as impaired or threatened in any Section 319 nonpoint assessment submitted to EPA. See 40 CFR §130.7(b)(5). In addition to

these minimum categories, States are required to consider any other data and information that is existing and readily available. EPA's 2006 Integrated Report Guidance, referenced below, describes categories of water quality related data and information that may be existing and readily available. See EPA's March 21st, 2011 memorandum on *Information Concerning 2012 Clean Water Act Sections 303(d), 305 (b), and 314 Integrated Reporting and Listing Decisions*, which recommended that the 2012 integrated water quality reports follow the Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act (2006 Integrated Report Guidance (IRG) issued July 29, 2005 (available at [http://www.epa.gov/owow/tmdl/2006\\_IRG/](http://www.epa.gov/owow/tmdl/2006_IRG/)) as supplemented by an October 12, 2006 memo and attachments, a May 5, 2009 memo and attachments, and the March 21, 2011 memo and attachments. All guidance, memoranda and attachments may be found at: <http://www.epa.gov/owow/tmdl/guidance.html>. While States are required to evaluate all existing and readily available water quality related data and information, States may decide to rely or not rely on particular data or information in determining whether to list particular waters.

In addition to requiring States to assemble and evaluate all existing and readily available water quality related data and information, EPA regulations at 40 CFR §130.7(b)(6) require States to include as part of their submissions to EPA documentation to support decisions to rely or not rely on particular data and information and decisions to list or not list waters. Such documentation needs to include, at a minimum, the following information: (1) a description of the methodology used to develop the list; (2) a description of the data and information used to identify waters; and (3) any other reasonable information requested by the Region.

### **Priority Ranking**

EPA regulations also codify and interpret the requirement in Section 303(d)(1)(A) of the Act that States establish a priority ranking for listed waters. The regulations at 40 CFR §130.7(b)(4) require States to prioritize waters on their Section 303(d) lists for TMDL development, and also to identify those WQLSs targeted for TMDL development in the next two years. In prioritizing and targeting waters, States must, at a minimum, take into account the severity of the pollution and the uses to be made of such waters. See Section 303(d)(1)(A). As long as these factors are taken into account, the Act provides that States establish priorities. States may consider other factors relevant to prioritizing waters for TMDL development, including immediate programmatic needs, vulnerability of particular waters as aquatic habitats, recreational, economic, and aesthetic importance of particular waters, degree of public interest and support, and State or national policies and priorities. See 57 FR 33040, 33045 (July 24, 1992), and EPA's 2006 Integrated Report Guidance and the 2006, 2009, and 2011 memoranda and attachments.

### **III. REVIEW OF MASSACHUSETTS' SECTION 303(d) SUBMISSION**

The Massachusetts Department of Environmental Protection (MassDEP) issued a draft 2012 Section 303(d) list of impaired waters for public review on March 12, 2012. MassDEP then revised the list based on comments received during the public comment period, including EPA comments sent by email on April 30, 2012. On April 2, 2013, EPA received from MassDEP the Commonwealth's final 2012 Section 303(d) list, which is included in Massachusetts' 2012 IL. EPA also received all relevant appendices to the Commonwealth's 2012 Section 303(d) list, a

copy of the public comments MassDEP received on its proposed list, and MassDEP's written responses to all public comments received. The integrated listing format (i.e., a combination of the State's Section 305(b) report and the State's Section 303(d) list) allows states to provide the water quality status of all assessed waters in a single multi-part list or document.

States may include each water body or segment thereof into one or more of the following five categories as part of its IL; however, only water bodies or segments placed in Category 5 (impaired by a pollutant and for which a TMDL is needed) constitute a state's Section 303(d) list:

- 1) All designated uses are supported, no use is threatened;
- 2) Available data and/or information indicate that some, but not all of the designated uses are supported;
- 3) There is insufficient available data and/or information to make a use support determination;
- 4) Available data and/or information indicate that at least one designated use is not being supported or is threatened, but a TMDL is not needed;
  - 4a) A state-developed TMDL has been approved by EPA or a TMDL has been established by EPA for any segment-pollutant combination
  - 4b) Other required control measures are expected to result in the attainment of an applicable water quality standard in a reasonable period of time
  - 4c) The non-attainment of any applicable water quality standard for the segment is the result of pollution and is not caused by a pollutant); and
- 5) Available data and/or information indicate that at least one designated use is not being supported or is threatened, and a TMDL is needed.

As noted above, Massachusetts generated the 2012 Section 303(d) list as a subset of its 2012 IL. The IL satisfies Massachusetts' obligation to report the water quality status of the Commonwealth's waters required by Section 305(b) of the Act. The Massachusetts 2012 IL is comprised of five categories of waters that are consistent with the suggested categories in EPA's *2006 Integrated Water Quality Monitoring and Assessment Report Guidance*. As noted above, Category 5 of the 2012 IL (see pages 109-186 of the IL) represents Massachusetts' 2012 Section 303(d) list and this is the category that EPA is approving in this memorandum.

Massachusetts has included all waters known not to be meeting water quality standards on its 2012 Section 303(d) list. Under its current listing approach, Massachusetts keeps a waterbody on its impaired waters list until a new assessment reveals that the waterbody is meeting all applicable water quality standards or is expected to meet those standards in a reasonable timeframe as the result of implementation of required pollution controls or when, upon re-examination, the original basis for listing is determined to be flawed. TMDLs for listed waters will be completed in accordance with the schedule, which reflect priority rankings and other relevant factors.

No Massachusetts waters are listed in Category 1 (all designated uses are supported, no use is threatened) because a statewide Massachusetts Department of Public Health advisory pertaining

to the consumption of finfish precludes any waters from being in full support of the fish consumption use.

EPA Category 4 includes waters that are currently not meeting water quality standards but do not need a TMDL completed due to one of three reasons. Waters for which TMDLs have already been approved are listed in Category 4a. Category 4b includes waters for which a “functionally equivalent” control action has been developed, i.e., an impairment caused by a pollutant is being addressed through other pollution control requirements. Massachusetts is not including any waters in Category 4b for the 2012 listing cycle. Waters in Category 4c are not attaining water quality standards but impairment is not caused by or associated with a pollutant. EPA reviews the Category 4 list to insure that the waters are categorized appropriately and do not belong in Category 5 (the Section 303(d) list).

As noted above, EPA Category 5 contains waters where available data and/or other information indicate that at least one designated use is not being supported or is threatened, and a TMDL is needed. EPA’s regulations at 40 CFR Section 130.7 require EPA to review and approve or disapprove a State’s Category 5 list of impaired waters. MassDEP chooses to list each waterbody segment in only one IL category; consequently, waters that have an approved TMDL for some pollutants, but not others, remain in Category 5 until TMDLs are approved for all of the pollutants impairing uses in those waters. The EPA tracks a State’s progress in completing TMDLs in EPA’s Assessment and Total Maximum Daily Load (TMDL) Tracking and Implementation System (ATTAINS), which can be accessed at <http://www.epa.gov/waters/ir>. This system assigns a unique identification number to each approved TMDL which is included for reference in categories 4a and 5 of the 2012 List.

### **Response to public comments**

MassDEP published the *Proposed 2012 Massachusetts Integrated List of Waters* on March 12, 2012 and provided a copy on the MassDEP web site. Category 5 of the proposed list was the proposed CWA Section 303(d) List of Impaired Waters. MassDEP placed the Notice of Availability of the proposed 2012 Section 303(d) list in the Environmental Monitor, and also sent it directly to over 120 organizations and “stakeholder” groups, key contacts at other government agencies, and requested that The New England Interstate Water Pollution Control Commission (NEIWPCC) forward it to neighboring state contacts. Comments were accepted from the public until April 30, 2012. Nine parties submitted comments during the public comment period. The Commonwealth included a detailed written Response to Public Comments in Appendix 5 of the 2012 IL. MassDEP also provided EPA with a copy of each comment letter prior to submittal of the 2012 IL. In the response to public comments (Appendix 5), MassDEP summarizes each comment and provides responses to each of the questions, concerns, and issues raised.

MassDEP received comments during the public comment period from the Lake Singletary Watershed Association, Massachusetts Water Resources Authority (MWRA), Nashua River Watershed Association (NRWA), Mass Audubon, Buzzards Bay Coalition, Connecticut River Watershed Council, Charles River Watershed Association (CRWA), Ipswich River Watershed Association, and Region 1 US EPA. MassDEP agreed in certain cases to review information

provided by the commenters and consider addition of certain waterbody segments to the Commonwealth's final 2012 Section 303(d) list (see page 7 below, "Waters Nominated by the Public"). The Commonwealth also revised or added certain language in its 2012 IL in response to certain public comments received. For example, in response to multiple comments received, MassDEP added a section to the 2012 IL to describe the Massachusetts Sustainable Water Management Initiative (SWMI) and how MassDEP would utilize information from that effort to inform future watershed assessments. Finally, Massachusetts provided answers to the questions, concerns, and issues raised by the public that EPA believes were appropriate, adequately responsive, and clarified why the Commonwealth made decisions regarding listing or delisting of certain waterbody segment impairments.

In summary, EPA has reviewed Massachusetts' responses to the public comments received related to the Commonwealth's 2012 Section 303(d) list decisions, and concludes that Massachusetts has appropriately and adequately responded to the comments.

#### **IV. IDENTIFICATION OF WATERS AND CONSIDERATION OF EXISTING AND READILY AVAILABLE WATER QUALITY-RELATED DATA AND INFORMATION**

EPA has reviewed Massachusetts' submission, and has concluded that Massachusetts developed its 2012 Section 303(d) list in compliance with Section 303(d) of the Act and 40 CFR Section 130.7. EPA's review and analysis considers whether the Commonwealth reasonably considered existing and readily available water quality related data and information and reasonably identified waters required to be listed.

Massachusetts developed its 2012 Section 303(d) list (Category 5) by updating its 2010 Section 303(d) list using all Section 305(b) water quality assessments that have been completed since the 2010 Section 303(d) list was published. Previously unlisted waterbodies that were determined to be impaired for one or more uses were added to the Commonwealth's 2012 Section 303(d) list unless data showed that the impairment was not caused by or associated with a pollutant. Determinations of impairments were based on valid monitoring data and/or evaluative information that were collected and determined to be sufficient to make Section 303(d) listing judgments.

The Commonwealth's 2012 Section 303(d) list was updated to reflect new data and/or other relevant information; in addition, corrections were made in 2012 to address any identified listing errors made during previous listing cycles. The MassDEP watershed assessments are continuously performed according to a rotating watershed schedule and existing and readily available data and information pertaining to each watershed are solicited from all potential sources at the outset of this process. Since the time the Commonwealth's 2010 IL was prepared, new assessments have been completed for the Blackstone, Boston Harbor (including Mystic, Neponset and Weymouth/Weir), Merrimack and Parker watersheds and the Cape Cod coastal drainage area, and these assessments furnished the majority of new information in support of the 2012 listing decisions. Changes to waters in watersheds other than these are few in number in 2012 and are documented in the IL. A complete list of the MassDEP watershed assessments embodied in the 2012 categorization of waters can be found in the Bibliography (pages 25-34) of the 2012 IL.

In preparing its 2012 Section 303(d) list, Massachusetts used all existing and readily available water quality-related data and information including those sources identified in 40 CFR §130.7(b)(5): (i) most recent §305(b) report; (ii) dilution calculations and predictive models; (iii) water quality problems reported by local, state, or federal agencies; members of the public; or academic institutions; and (iv) §319 non-point source assessments. Massachusetts relied on these and additional sources of information (identified in the section of the IL entitled, “General Approach to Assessing Massachusetts’ Waters”, pages 12-15) to prepare the individual watershed assessment reports which together with the 2010 Section 303(d) list provide the basis for compiling the 2012 Section 303(d) list.

Massachusetts actively solicits external sources of information and water quality data to perform assessments. Sources of information used in developing the 2012 Section 303(d) list include federal agencies, state agencies, local governments, academic institutions, and watershed associations. Water quality information obtained from these and other agencies or groups was considered in development of the 2012 Section 303(d) list. Typically the sources of data used for assessments are cited in the individual watershed assessment reports. However, MassDEP also relied on water quality-related data and information that was submitted during the public comment period for the 2012 Section 303(d) list. In those cases where valid water quality-related data and/or other information was provided during the public comment period and used as the basis for listing a waterbody segment impairment on the final 2012 Section 303(d) list, the source of this data and/or other information is identified in Appendix 5 of the final 2012 IL, the Commonwealth’s written Responses to Public Comments.

EPA has reviewed Massachusetts’ description of the data and/or other information it considered, its methodology for identifying waters, and relevant individual watershed assessment reports. EPA concludes that the Commonwealth properly assembled and evaluated all existing and readily available water quality-related data and information, including data and information relating to the categories of waters specified in 40 CFR Section 130.7(b)(5).

Among the information EPA reviewed were MassDEP’s watershed reports that contained information to support the delisting of waterbody segment impairments based upon new assessments. Those watershed reports addressed the Blackstone River, Cape Cod, Charles River, SuAsCo (Concord River), Merrimack River, Neponset River, Parker River, and Taunton River Watersheds. In some cases, Massachusetts does consider including waters on the Section 303(d) list based on data older than 5 years of age (i.e., “evaluated” waters under EPA’s Section 305(b) guidance) where such data show excursions above one or more criteria of Massachusetts’ surface water quality standards. Although data older than 5 years is considered “evaluative” information under EPA’s Section 305(b) guidance, Massachusetts chose to use such data in specific cases as a basis for listing or delisting a waterbody segment impairment. In those instances, the Commonwealth concluded that the use of such data is reasonable because, without specific information to the contrary, there is no reason to believe that data older than 5 years are no longer representative of the water quality of the waterbody in question. EPA believes this conclusion is reasonable, and it is consistent with EPA regulations for states to decide to list waters based on data older than 5 years. The regulations require states to consider all available data and to use it unless the state provides a reasonable rationale for not doing so.

## **New Impairments**

### **WaterBody Segment Impairments not listed on Massachusetts' 2010 Section 303(d) list, but which are being newly listed on Massachusetts' 2012 Section 303(d) list**

Appendix 2 of the 2012 IL identifies the segments and their specific impairments added to Category 5 (impaired and for which a TMDL must be established). The *additions* result in the following changes between the 2010 and 2012 Section 303(d) lists as follows (it is important to note that Massachusetts places each waterbody segment in only one IL category):

Segments newly identified as impaired in the IL and added to Category 5	8
Segments moved from Category 2 to Category 5	1
Segments moved from Category 3 to Category 5	27
Segments moved from Category 4a to Category 5	12
Segments moved from Category 4c to Category 5	1
Segments already in Category 5 with new impairments added (and remaining in Category 5)	71

These additions to the 2012 Section 303(d) list, outlined in Appendix 2 of the IL, involve a total of 120 water body segments.

In July 2012, MassDEP published the *Massachusetts Consolidated Assessment and Listing Methodology (CALM) Guidance Manual*. EPA notes that while it is not acting to approve or disapprove Massachusetts' listing methodology set forth in its CALM, EPA has reviewed all of the relevant material and concludes that the methodology MassDEP used to develop the impaired waters list is reasonable and consistent with Massachusetts' surface water quality standards, the Clean Water Act and EPA Section 303(d) regulations and guidelines.

### **Waters Nominated by the Public**

During the public review period, a number of waterbodies were nominated by the public for inclusion on the Commonwealth's 2012 Section 303(d) list. Massachusetts reviewed and considered all such comments, as well as all water quality related data and other information submitted by the public, including any new fish consumption health advisories. Appendix 5 of the 2012 IL, Responses to Public Comments, documents the public comments received as to these waterbodies and the Commonwealth's responses to the public's comments. All of these additions outlined below are included in Appendix 2 of the 2012 IL.

As a result of public comments, Massachusetts added seven previously unlisted waterbody segments to its 2012 Section 303(d) list. At the request of the Buzzards Bay Coalition, six previously unlisted waterbody segments in the Buzzards Bay Watershed were added to the 2012 Section 303(d) list: Butler Cove (MA95-77), Fiddlers Cove (MA95-79), Herring Brook (MA95-21), Little Buttermilk Bay (MA95-76), Rands Harbor (MA95-78) and Sippican River (MA95-06).

One segment in the Nashua River Watershed was also added at the request of the NRWA:

Bartlett Pond (MA81008). MassDEP also added one new impairment to a waterbody segment previously listed in Category 5 (for other impairments) at the request of CRWA: Charles River (MA72-38) for e.coli.

Massachusetts also decided not to list a number of waterbodies and impairments that were nominated for listing by members of the public. The MassDEP's rationales for not listing specific waterbodies and impairments are provided in Appendix 5, Responses to Public Comments. EPA has reviewed MassDEP's responses to all public comment received and has concluded that Massachusetts' decision not to include on the Commonwealth's 2012 Section 303(d) list certain proposed waterbody impairments identified by the public is reasonable for the reasons discussed below. Massachusetts' two primary reasons for not listing waters based on the information received are that (1) the segments and impairments in question were already listed in the 2012 IL cycle in Category 5 or 4a for impairments directly related to those being newly proposed by the public and/or (2) insufficient data and/or other information was provided by the public to confirm that an impairment exists and to support a Section 303(d) listing decision.

During the public comment period on the Commonwealth's proposed 2012 Section 303(d) list, the Buzzards Bay Coalition requested the addition of seven waterbody segment impairments to Massachusetts' list of impaired waters. MassDEP subsequently worked with Buzzards Bay Coalition to evaluate the data presented and ultimately agreed to add six of the seven segment impairments to the Commonwealth's final list of impaired waters, as previously detailed above. However, MassDEP did not agree to the Coalition's request for the seventh segment (MA95-17) to be added to the Section 303(d) list for a nutrient impairment as this segment is already listed in Category 5 for a directly related impairment (Estuarine Bioassessments).

Similarly, MassDEP did not agree to list two segments in the Charles River Watershed, Charles River (MA72-36) and Charles River (MA72-38), for *Enterococcus* that were nominated by CRWA. The rationale for MA72-36 is the same as for MA95-17, i.e., that the Charles River (MA72-36) is also already on the 2012 303(d) list for a related bacteria impairment (e.coli) for which an EPA approved bacteria TMDL already exists. MassDEP and EPA have concluded that the existing bacteria TMDL will address any impairment that would arise from and be demonstrated by *Enterococcus* data. Charles River (MA72-38) was identified above as an addition by MassDEP to the Section 2012 303(d) list based on comments from CRWA for a directly related bacteria impairment (e.coli). As both segments are now listed for bacteria impairments on the 2012 Section 303(d) list, EPA agrees with MassDEP's decision not to list the waterbody segments separately for *Enterococcus*.

EPA also agrees with MassDEP's assessment methodology related to utilizing data within a single year to calculate a geomean rather than combining multiple years of data, noted as a part of the MassDEP's response to certain aspects of the Charles River Watershed's comments.

### **Delistings**

**Water Body Segment Impairments not listed on Massachusetts' 2012 Section 303(d) list, but which were listed on Massachusetts' 2010 Section 303(d) list.**



EPA requested that Massachusetts provide a rationale for its decision not to include on its 2012 Section 303(d) list previously listed waters. As discussed below, Massachusetts has demonstrated to EPA's satisfaction good cause for not listing those waters, consistent with 40 C.F.R. Section 130.7(b)(6)(iv).

Massachusetts' Section 303(d) submittal describes the basis for removing waterbodies from the list. Massachusetts also provided an accounting and tracking of every waterbody and pollutant combination that was included on the Commonwealth's 2010 Section 303(d) list but is not included on the 2012 Section 303(d) list. EPA reviewed this list and the Commonwealth's rationale for the delistings. Waterbody segment impairments were removed from the list because (1) new water quality-related information indicates that the water body is in attainment with the relevant Massachusetts surface water quality standards; (2) the impairment identified in prior listing cycles was subsequently determined to be inconsistent with assessment methodology; (3) TMDLs were completed and approved by EPA; or (4) corrections were made in 2012 to address any identified listing errors made during previous listing cycles. Appendix 3 of the IL details the waterbody segment impairments removed between the final 2010 and final 2012 Section 303(d) lists.

MassDEP completed revisions to the detailed watershed assessment reports for four major watersheds and one coastal drainage areas during this listing cycle; the Blackstone, Boston Harbor (including Mystic, Neponset and Weymouth/Weir), Merrimack and Parker watersheds and the Cape Cod coastal drainage area. MassDEP references these and all other watershed assessment reports utilized in the development of the Integrated List. The watershed assessment reports can be found on MassDEP's website at <http://www.mass.gov/dep/water/resources/wqassess.htm>. The watershed assessment reports present a summary of all existing and readily available data and information pertaining to a water body segment and, if sufficient information exists, a determination with regard to whether or not individual designated uses are supported. The detailed watershed reports and information provided by the public provided the basis for MassDEP's 2012 delistings. Massachusetts evaluated the new data and any other relevant information and conducted use attainment assessments for these waters in accordance with the approach used for all waters and outlined in the listing methodology. EPA agrees that MassDEP has demonstrated that delisting is appropriate for these segments and their associated impairments for the reasons described below.

#### New Assessments

MassDEP delisted 25 impairments in 14 waterbody segments from Category 5, due to new assessments completed since the 2010 Section 303(d) list. Two of these water body segments were delisted from Category 5 to Category 2. One segment was delisted to Category 4a, and 11 of the segments remain in Category 5. Despite attaining water quality standards for one or more listed pollutants, the eleven segments remaining in Category 5 are impaired for additional pollutants for which one or more TMDLs are required. Massachusetts evaluated the new data and any other relevant information and conducted use attainment assessments for these waters in accordance with the approach used for all waters and outlined in the listing methodology. These waters will continue to be reassessed during the MassDEP's five-year rotating basin schedule. EPA agrees that MassDEP has demonstrated that delisting is appropriate for these waterbody

segment impairments.

### Administrative Changes

Two waterbody segments were delisted from Category 5 to Category 4c as a result of administrative changes made by Massachusetts during the development of the 2012 Section 303(d) list. One segment was delisted because the original listing in Category 5 was determined to be inconsistent with the MassDEP's assessment and listing methodology and should not have been listed originally. The second segment was delisted due to clarifications in segments covered by a Massachusetts Department of Public Health (MassDPH) "Mercury in Fish Tissue" advisory.

### Approved TMDLs

Massachusetts has delisted 93 pollutant impairments in 52 different waterbody segments for which TMDLs have been established and approved by EPA. Twenty-eight of these segments are identified in Category 4a because a TMDL has been completed for all the known pollutant impairments of those segments. Twenty-four of the segments are still impaired for pollutants other than for the ones for which the TMDLs in question were developed. These segments remain in Category 5 because Massachusetts does not place any one segment into more than one category.

### Waterbody segment impairments newly covered under addenda to previously approved TMDLs

- Additionally, through its routine watershed assessments MassDEP has identified 35 newly assessed impairments in 34 waterbody segments that can be brought into attainment with water quality standards through the application of already approved TMDLs. These impairments are identified in Appendix 4 of the IL. It is important to note that three of the impairments in three waterbody segments identified in Appendix 4 were originally listed in Category 5 of the 2010 Section 303(d) list. MassDEP developed two TMDL addenda to previously approved TMDLs to cover these new impairments. The TMDL addenda were noticed separately for public review and comment and submitted to EPA for final approval. Approval dates for the TMDL addenda are identified in Appendix 4 of the IL. Thirty of these newly identified impairments in twenty-nine waterbody segments will be placed directly into Category 4a because they are covered by an approved TMDL. The remaining five newly identified impairments in five waterbody segments covered by the TMDL addenda are still impaired for pollutants other than the ones for which the TMDL addenda were developed and therefore remain in Category 5 because Massachusetts does not place any one segment into more than one category.

In summary, EPA recognizes that Massachusetts' delisting in 2012 of the previously listed waterbody segment impairments described in this section, as well as the waterbody segment impairments directly placed into Category 4a described above has been done in accordance with 40 CFR Section 130.7(b) and EPA's Section 303(d) listing guidance. For each of the water body segment impairments delisted from Category 5 to Category 4a, EPA agrees that the State has reasonably concluded that the identified impairments no longer need to be on the Section 303(d) list because the impairment is now the subject of an EPA-approved TMDL. For each of the water

body segment impairments placed directly into Category 4a, EPA agrees that the State has reasonably concluded that the identified impairments do not need to be on the Section 303(d) list because the impairment is the subject of an EPA-approved TMDL.

### **Priority Ranking**

EPA reviewed Massachusetts' priority ranking of listed waters for TMDL development, and concludes that the Commonwealth properly took into account the severity of pollution and the uses to be made of such waters, as well as other relevant factors such as the complexity of the impairment and availability of quality information on it, and the likelihood that a remedy might be implemented before a TMDL could be developed. In addition, EPA reviewed the Commonwealth's identification of WQLSs targeted for TMDL development in the next two years, and concludes that the targeted waters are appropriate for TMDL development in this time frame.

In order to set priorities for TMDL development MassDEP evaluated the causes and locations of impairments across the Commonwealth, using the most recent version of the Section 303(d) list. A review of recent Section 303(d) list submittals reveals that the major causes of surface water impairment in Massachusetts are pathogens and excess nutrients. Therefore, MassDEP continues to place a high priority on developing TMDLs for these pollutants, and this is implicit in the TMDL schedule (pages 23-24 of final IL). The TMDL schedule outlined on page 23 of the 2012 IL is focused on completing bacteria TMDLs for watersheds in Eastern Massachusetts and nutrient TMDLs for estuaries in Southeastern Massachusetts.

In addition to the pathogen and nutrient related TMDLs, the Commonwealth's 2012 Section 303(d) list submission identifies several targeted waterbodies where TMDL work is either ongoing or planned for the near future (page 24 of the IL). Waters targeted for TMDL development during the next 2 years reflect a variety of serious water quality problems affecting various designated uses. For many of the targeted waters the public has expressed its interest for the Commonwealth to begin TMDL development.

In conclusion, EPA finds the TMDL prioritization and targeting approach used by Massachusetts to be reasonable considering all factors including the large number of waters on the list and the overall pace at which TMDLs will be developed. Massachusetts' watershed approach provides watershed-based priority rankings for Section 303(d) listed waters. In addition, it provides a framework in which meaningful priority rankings will be established for each of the listed waterbody segments. In targeting waterbodies for TMDL development, Massachusetts continues to take into account the severity of the pollution and the uses to be made of such waters. Consistent with EPA's regulation (40 CFR Section 130.7(b)(4)), Massachusetts did identify the segments targeted for TMDL development in the next two years.

### **Waterbodies on Tribal Lands**

EPA's approval of Massachusetts' Section 303(d) list extends to all water bodies on the list with the exception of those waters, if any, that are within Indian Country, as defined in 18 U.S.C. Section 1151. EPA is taking no action at this time to approve or disapprove the

Commonwealth's list with respect to waters within Indian Country. EPA, or any eligible Indian Tribe, as appropriate, will retain responsibilities under Section 303(d) for those waters.

### **Waters impaired by nonpoint sources of pollution**

The Commonwealth properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with Section 303(d) and EPA guidance. Section 303(d) lists are to include all WQLSs still needing TMDLs, regardless of whether the source of the impairment is a point and/or nonpoint source. EPA's long-standing interpretation is that Section 303(d) applies to waters impacted by point and/or nonpoint sources. In 'Pronsolino v. Marcus,' the District Court for Northern District of California held that Section 303(d) of the Clean Water Act authorizes EPA to identify and establish total maximum daily loads for waters impaired by nonpoint sources. Pronsolino v. Marcus, 91 F. Supp. 2d 1337, 1347 (N.D.CA. 2000). This decision was affirmed by the 9th Circuit court of appeals in Pronsolino v. Natri, 291 F.3d 1123 (9th Cir. 2002). See also EPA guidance (U.S. EPA, 2005). Waters identified by the Commonwealth as impaired or threatened by nonpoint sources of pollution (NPS) were appropriately considered for inclusion on Massachusetts' 2012 Section 303(d) list. Massachusetts properly listed waters with nonpoint sources causing or expected to cause impairment, consistent with Section 303(d) regulations and EPA guidance.

EPA concludes that MassDEP properly considered waters identified by the Commonwealth as impaired or threatened in nonpoint assessments under Section 319 of the CWA in the development of the 2012 Section 303(d) list.